Kekal Baru Sdn Bhd v Southwest Minerals (M) Sdn Bhd

COURT OF APPEAL (PUTRAJAYA) — CIVIL APPEAL NO P-02(NCVC)(W)-1230–07 OF 2014
LIM YEE LAN, ROHANA YUSUF AND VERNON ONG JJCA
27 JANUARY 2015

Contract — Terms — Construction of — Contract for sale of iron ore — Parties agreed shipment of iron ore would meet specified iron and moisture content with price adjustment for not meeting specifications — Iron ore samples tested at loading port — Whether commercially reasonable interpretation of contract entitled plaintiff to claim for price adjustment for iron content — Whether contract was an ex-seller mining site contract — Whether clauses should be construed to refer to inspection of iron ore for iron content at mining site or loading port — Whether trial judge erred by taking into account subsequent conduct of parties

By way of a written agreement the defendant agreed to sell to the plaintiff 10,000 MT of iron ore ('the contract'). Clause 6 of the contract provided that each shipment of iron ore had to meet a certain iron content and moisture content, with a price adjustment in the event the iron ore did not meet these specifications. Under cl 9 of the contract the plaintiff/buyer was entitled to have the goods inspected by SGS Laboratory Services Sdn Bhd ('SGS') at the mining site to confirm that the iron ore conformed to the specifications before shipment. At the plaintiff's request, the defendant had sent the iron ore to the Malacca Port for shipment to China. At the loading port a total of six composite samples of the iron ore were taken and sent to SGS for analysis. SGS issued a certificate of quality. Subsequently at the defendant's request a second test was conducted at the loading port. The results of the second test, which were consistent with the first test, were agreed by the parties as the final analysis for the payment. The plaintiff paid the defendant for the iron ore shipment and other charges. The plaintiff then claimed price adjustments of RM283,500 and RM54,432 for the iron content and moisture content respectively, based on the second SGS report at the loading port. The plaintiff's claim was premised on cl 6 of the contract. The High Court found in favour of the plaintiff and ordered the defendant to pay the plaintiff the price adjustments claimed. This was the defendant's appeal against that decision on the grounds that cl 6 of the contract did not apply. It was the defendant's argument that as the plaintiff had not inspected the iron ore at the mining site, cl 6 on price adjustment for iron content did not apply. As such, the defendant argued that the plaintiff could not demand that the price be adjusted for the iron content after the iron ore had been delivered based on the second SGS report at the loading port. The plaintiff submitted that the fact that no pre-shipment testing was done did not

disentitle it from claiming a price adjustment for the iron content based on the second SGS report. The plaintiff further submitted that it had a discretion under the contract as to whether pre-shipment testing ought to be done or not.

Held, allowing the appeal with costs of RM20,000:

(1) It is settled law that in interpreting a private contract of a commercial nature, a commercially sensible construction would be preferred, whereby the words would be interpreted in the way in which a reasonable commercial person would construe them or in a manner that was most likely to give effect to the intention of the parties. In the present case, the contract spoke for itself. It was apparent from cl 3 of the contract that the contract was an ex-seller mining site contract where inter alia it was for the plaintiff to take delivery of the iron ore at the mining site. Further cl 9 of the contract specifically dealt with pre-shipment inspection at the mining site. As such, it would not be commercially sensible for the contract to be interpreted so as to give the plaintiff the option to reject the iron ore at the loading port since no pre-shipment inspection was conducted at the mining site (see paras 20–24).

(2) Although the first part of cl 6 related to price adjustment for iron content based on the SGS report, the reference to 'loading port' was absent in the first part relating to price adjustment for iron content. Thus, the only commercially reasonable and sensible interpretation was for cl 6 to be read subject to cl 9. The pre-shipment inspection provided under cl 9 specifically referred to the shipment of iron ore, ex-mining site under the first part of cl 6. Therefore, the clauses should be construed to refer to the inspection of the iron ore for the iron content at the mining site and not at the loading port. This construction is fortified by the second part of cl 6 on moisture content where specific reference is made to the SGS report at loading port whereas in the former, there is no such reference (see para 26).

(3) By taking into account the subsequent conduct of the parties, the trial judge had misdirected himself on the law (see para 27).

[Bahasa Malaysia summary

Melalui perjanjian bertulis defendan bersetuju untuk menjual kepada plaintif 10,000 MT bijih besi ('kontrak'). Klausa 6 kontrak memperuntukkan bahawa setiap penghantaran bijih besi mesti memenuhi kandungan bijih dan kandungan lembapan tertentu, dengan pelarasan harga jika bijih besi tersebut tidak memenuhi spesifikasi ini. Di bawah klausa 9 kontrak plaintif/pembeli berhak untuk barangan diperiksa oleh SGS Laboratory Services Sdn Bhd ('SGS') di tapak lombong untuk mengesahkan bijih besi mematuhi kepada spesifikasi sebelum penghantaran. Atas permintaan plaintif, defendan telah menghantar bijih besi ke pelabuhan Melaka untuk penghantaran ke China. Di

pelabuhan pemuatan sejumlah enam komposit sampel bijih besi diambil dan dihantar ke SGS untuk analisa. SGS mengeluarkan sijil kualiti. Kemudiannya atas permintaan defendan ujian kedua dijalankan di pelabuhan pemuatan. Ini mengakibatkan ujian kedua, yang mana adalah konsisten dengan ujian pertama, dipersetujui oleh pihak-pihak sebagai analisa terakhir untuk bayaran. Plaintif membayar kepada defendan untuk penghantaran bijih besi dan caj-caj lain. Plaintif kemudiannya menuntut pelarasan harga sebanyak RM283,500 dan RM54,432 masing-masing bagi kandungan besi dan kandungan lembapan, berdasarkan ke atas laporan SGS kedua di pelabuhan pemuatan. Tuntutan plaintif didasarkan ke atas klausa 6 kontrak. Mahkamah Tinggi memutuskan memihak plaintif dan memerintahkan defendan untuk membayar plaintif pelarasan harga yang dituntut. Ini adalah rayuan defendan terhadap keputusan atas alasan bahawa klausa 6 kontrak tidak diguna pakai. Ia adalah hujahan defendan bahawa memandangkan plaintif tidak memeriksa bijih besi di tapak lombong, klausa 6 atas pelarasan harga untuk kandungan besi tidak diguna pakai. Dengan itu, defendan berhujah bahawa plaintif tidak boleh menuntut bahawa harga dibetulkan selepas bijih besi dihantar atas laporan SGS kedua di pelabuhan pemuatan. Plaintif berhujah bahawa fakta bahawa tiada ujian pra penghantaran dibuat tidak menghilangkan haknya daripada menuntut pelarasan harga untuk kandungan besi berdasarkan laporan SGS kedua. Plaintif selanjutnya berhujah bahawa ia mempunyai budi bicara di bawah kontrak sama ada ujian pra penghantaran patut dilakukan atau tidak.

Diputuskan, membenarkan rayuan dengan kos sebanyak RM20,000:

(1) Adalah undang-undang tetap bahawa dalam mentafsirkan kontrak persendirian bersifat perdagangan, tafsiran perdagangan yang wajar akan disukai, di mana perkataan-perkataan akan ditafsirkan dalam cara orang perdagangan yang munasabah akan mentafsirnya atau dalam cara yang mungkin memberi kesan kepada niat pihak-pihak. Dalam kes ini, kontrak jelas tidak memerlukan penjelasan. Adalah jelas daripada klausa 3 kontrak bahawa kontrak tersebut adalah kontrak ex-seller mining site di mana antara lain ia adalah untuk plaintif menerima penghantaran bijih besi di tapak lombong. Selanjutnya klausa 9 kontrak berurusan secara spesifik dengan pemeriksaan di tapak lombong. Dengan itu, ia tidak akan secara komersial wajar bagi kontrak ditafsirkan seperti memberi kepada plaintif pilihan untuk menolak bijih besi di pelabuhan pemuatan memandangkan tiada pemeriksaan pra penghantaran dijalankan di tapak lombong (lihat perenggan 20–24).

(2) Walaupun bahagian pertama klausa 6 berkaitan kepada pelarasan kandungan besi berdasarkan laporan SGS, rujukan kepada 'loading port' tiada dalam bahagian pertama berkaitan pelarasan harga untuk kandungan besi. Oleh itu, satu-satunya tafsiran yang secara komersial munasabah dan wajar adalah untuk klausa 6 dibaca tertakluk kepada

klausa 9. Pemeriksaan pra penghantaran yang diperuntukkan di bawah klausa 9 secara spesifik merujuk kepada penghantaran bijih besi, tapak bekas lombong di bawah bahagian pertama klausa 6. Oleh itu, klausa-klausa patut ditafsirkan untuk merujuk kepada pemeriksaan bijih besi untuk kandungan besi di tapak lombong dan bukan di pelabuhan pemuatan. Pentafsiran ini diperkukuhkan oleh bahagian kedua klausa 6 atas kandungan lembapan di mana rujukan spesifik dibuat kepada laporan SGS di pelabuhan pemutan yang mana di dalam laporan terdahulu, tiada rujukan sedemikian (lihat perenggan 26).

(3) Dengan mengambil kira tingkah laku berikutnya oleh pihak-pihak, hakim bicara telah salah arah dari segi undang-undang (lihat perenggan 27).]

Notes

For cases on construction of terms, see 3(4) *Mallal's Digest* (5th Ed, 2015) paras 7150–7200.

Cases referred to

Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd [2010] 1 MLJ 597, FC (folld)

Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor [2011] 6 MLJ 464; [2011] 9 CLJ 257, FC (refd)

Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd [1997] AC 749, HL (refd)

Appeal from: Civil Trial No 22NCVC-441–06 of 2012, High Court of Pulau Pinang.

Chan Sock Mun (Tan Chuan Yong & SM Chan) for the appellant.
M Thayalan (Malkit Singh Randhawa Baidura & Co) for the respondent.

Vernon Ong JCA:

INTRODUCTION

[1] This appeal stems from the decision of the High Court ordering the defendant to pay to the plaintiff the sum of RM283,500 being adjustment for iron (Fe) content, RM54,432,00 being adjustment for moisture content and RM3,227 being the defendant's portion of the charges for obtaining the analysis report in respect of iron ore supplied by the defendant.

[2] On 27 January 2015, we heard submission of counsel for the parties. After perusing the written submissions and record of appeal, we allowed the defendant's appeal with costs. The grounds of our decision are as follows. For

convenience, the parties shall be referred to as they were in the court below.

BRIEF ACCOUNT OF THE SALIENT FACTS

[3] Pursuant to a written agreement for the sale and purchase of iron ore dated 28 February 2012 ('the contract'), the defendant agreed to sell and the plaintiff agreed to buy 10,000 MT (+/- 10% at buyer's option) of iron ore 0–50mm Fe 54% at the price of RM140 per wet metric ton ('WMT') ex-seller mining site.

[4] At the plaintiff's request, the defendant sent the iron ore shipment to the Malacca Port to be loaded onto the vessel MV Christina for shipment to China. A total of 8,100 MT was loaded on the said vessel.

[5] The plaintiff paid the defendant a total sum of RM1,376,000 for the iron ore shipment (RM1,134,000) and other charges (RM242,200).

[6] A total of six composite samples of the iron ore were taken at the loading port. One such sample was sent to SGS Laboratory Services (M) Sdn Bhd ('SGS') for analysis. According to SGS' analysis report dated 24 April 2012 ('the first SGS report'), the Fe content was 50.5% and moisture content was 12.8%. SGS also issued a certificate of quality dated 26 April 2012 certifying that analysis results.

[7] At the defendant's request, SGS conducted another test at the loading port. According to SGS' analysis report dated 4 May 2012 ('the second SGS report'), the Fe and moisture content were consistent with that of the first SGS report.

[8] On 4 May 2012, the plaintiff and the defendant signed a document ('exh P7') whereby it was agreed that they would accept the second SGS report 'as final analysis standard and calculation for the payment'.

[9] The plaintiff's claim for the price adjustments for iron and moisture content is premised on cl 6 of the contract which provides for price adjustment.

FINDINGS OF THE LEARNED JUDICIAL COMMISSIONER

[10] The findings of the learned judicial commissioner ('the JC') may be summarised as follows:

(a) the contract is not a conditional contract. Clause 9 of the contract does not make it a condition precedent for the plaintiff to have the iron ore tested by SGS before the contract can be executed;

(b) the plaintiff had the option to have the iron ore inspected by SGS at the mining site;

(c) the plaintiff is entitled to have the iron ore inspected at the loading port under cl 6;

(d) the words 'each shipment' and 'cargo' in cl 6 under the heading 'Price Adjustment for Fe content based on SGS report' refers to the iron ore at the loading port;

(e) based on cll 6 and 14 of the contract, there must be price adjustment for Fe content based on the second SGS report at the loading port;

(f) the fact that no pre-shipment inspection was done does not entitle the plaintiff from asking for the price adjustment for the Fe content based on the second SGS report at the loading port; and

(g) the subsequent conduct of the defendant shows that the defendant agreed to the price adjustment for the Fe content.

SUBMISSION OF PARTIES

[11] Learned counsel for the defendant argued that cl 9 is a pre-shipment inspection clause. It is for the plaintiff to satisfy itself that the iron ore was according to specifications prior to delivery of the iron ore ex-seller mining site. The plaintiff did not have the iron ore inspected by SGS at the mining site pursuant to cl 9.

[12] Learned counsel also argued that the plaintiff is not entitled to claim for the price adjustment on the basis of the Fe content based on the second SGS report. Since the plaintiff had elected not to have the iron ore inspected by SGS on site as provided under cl 9 of the contract, the plaintiff must be taken to have accepted that the iron ore conformed to the specifications. The plaintiff cannot demand that the price be adjusted for Fe content after the iron ore had been delivered.

[13] In essence, the defendant's argument is that the contract was based on an ex-seller mining site basis; the price adjustment for Fe content must be based on an inspection done at the mining site. As the plaintiff elected not to inspect the iron ore at the mining site, cl 6 on price adjustment for Fe content does not apply. Therefore, the plaintiff is not entitled to any price adjustment for Fe content based on the second SGS report at the loading port.

[14] Learned counsel submitted that the only price adjustment contemplated post-delivery is adjustment for moisture content at loading port. The words 'final adjustment payment' in cl 14 refers to price adjustment for moisture content based on the second SGS report at loading port.

[15] In reply, learned counsel for the plaintiff argued that price adjustment for Fe content should be based on the second SGS report at the loading port. The contract is not an 'Ex-Seller Mining Site contract'. The plaintiff has a discretion on whether to do pre-shipment testing. The fact that no pre-shipment testing was done does not disentitle the plaintiff from asking for a price adjustment for Fe content based on the second SGS report.

[16] Learned counsel argued that cl 6 allows the plaintiff to obtain the SGS report on the iron ore at the loading port and that cll 6 and 14 provide for price adjustment for Fe content based on the second SGS report. Clauses 6 and 14 of the contract must be read together. As such, there must be a price adjustment for Fe content.

[17] Learned counsel also argued that the defendant's conduct clearly shows that the defendant agreed that price adjustments for Fe content must be made based on the second SGS report. DW1 witnessed the second testing for Fe and moisture content which was done by SGS on 4 May 2012 at the loading port. DW1 agreed and accepted exh P7 as the basis for the calculation of the price adjustment.

DECISION

[18] There is only one main issue in this appeal. It is whether the plaintiff is entitled to a price adjustment for Fe content of the iron ore based on the second SGS report at the loading port.

[19] The key to the determination of this issue revolves around the interpretation of cll 6, 9 and 10 of the contract. The pertinent clauses are reproduced below.

> (6) Price Adjustment for Fe content based on SGS report:
>
> In respect of each shipment of iron ore lumps which does not meet the Fe specifications at set forth above and base price referred to in clause 3 shall be adjusted as follow:
>
> (i) The base price shall be increased by RM10 per metric ton for each 1% Fe above 54% fraction pro-rata.
>
> (ii) The base price shall be decreased by RM10 per metric ton for each 1% Fe below 54% fraction pro-rata.
>
> (iii) The buyer has the option to reject the cargo if Fe content is below 50%.
>
> For moisture:
>
> Based on SGS report *at loading port*, moisture 50:50. SGS cost share between seller and buyer.
>
> (9) Pre-shipment Inspection

A The buyer is entitled to have the goods inspected by SGS Malaysia at Buyer's expenses at the mining site.

If the pre-shipment results is found acceptable and conformity of the specifications, then this contract shall be executed according to the terms and conditions stated herein.

B (10) Payment Mode: Payment deposit amounting RM100,000 once signed contract. Buyer shall remit payment 30% of the total cargo value to the seller's account after delivery Iron Ore Lumps 4000mt to port. Balance amount should remit within 7 days after complete deliver cargo to port. Final payment adjustment will be based on SGS result at loading port. (Emphasis added.)

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[20] In *Berjaya Times Squares Sdn Bhd (formerly known as Berjaya Ditan Sdn Bhd) v M Concept Sdn Bhd* [2010] 1 MLJ 597 (FC), the Federal Court laid down four instructive guidelines to be followed in interpreting a private contract. They are as follows:

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(a) a court interpreting a private contract is not confined to the four corners of the document;

(b) the court is entitled to look at factual matrix forming the background to the transaction;

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(c) the court must disregard any part of the background that is declaratory of subjective intent only; and

(d) the court should adopt an objective approach when interpreting a private contract.

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[21] In other words, the meaning of the contract is to be discovered from the words which the parties have used read in the context of the surrounding circumstances in which the contract was entered into.

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[22] To put the objective approach in another way, in interpreting a private contract of a commercial nature, the court would prefer a commercially sensible construction; whereby the words are interpreted in the way in which a reasonable commercial person would construe them. In other words, the court will give effect to a commercial construction that is more likely to give effect to the intention of the parties (see *Damansara Realty Bhd v Bungsar Hill Holdings Sdn Bhd & Anor* [2011] 6 MLJ 464; [2011] 9 CLJ 257 (FC); and *Mannai Investment Co Ltd v Eagle Star Life Assurance Co Ltd* [1997] AC 749 (HL)).

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[23] In our view, the contract speaks for itself. It is apparent from cl 3 of the contract that the contract is an Ex-Seller Mining Site contract. The price of the iron ore does not include any other charges such as delivery and pre-shipment

inspection (cll 8 and 9); as such, the plaintiff qua buyer bears the costs of delivery and inspection. It is for the plaintiff to take delivery of the iron ore at the mining site.

[24] Clause 9 specifically deals with pre-shipment inspection at the mining site. The plaintiff's argument that it was the commercial intention of the parties to have the inspection of iron content at the loading port is inconsistent with the plain and ordinary meaning of cl 9. As such, it would not be commercially sensible for the contract to be interpreted so as to give the plaintiff the option to reject the iron ore at the loading port since no pre-shipment inspection was conducted at the mining site.

[25] The first part of cl 6 relates to price adjustment for iron content based on SGS report. It refers to 'each shipment' of the iron ore which does not meet the Fe specifications. The second part of cl 6 relates to the moisture content and it refers to 'SGS report at loading port'. It is significant to note that the reference to 'loading port' is absent in the first part relating to price adjustment for Fe content.

[26] Applying the principles enunciated in *Berjaya Times Squares* case, the only commercially reasonable and sensible interpretation is for cl 6 to be read subject to cl 9. The pre-shipment inspection provided under cl 9 specifically refers to the shipment of iron ore, ex-seller mining site under the first part of cl 6 under heading 'Price Adjustment for Fe content based on SGS report'. Therefore, the clauses must be construed to refer to the inspection of the iron ore for Fe content at the mining site and not at the loading port. This construction is fortified by the second part of cl 6 on moisture content where specific reference is made to the SGS report at loading port whereas in the former, there is no such reference.

[27] We also observe that in construing the contract, the learned JC took into account the subsequent conduct of the parties. We do not think that that is the right approach and in that regard, the learned JC misdirected himself on the law.

[28] For the foregoing reasons, we are not in agreement with the findings of the learned JC. Accordingly, the appeal was allowed with costs of RM20,000.

Appeal allowed with costs of RM20,000.

Reported by Kohila Nesan